STATE OF WISCONSIN
Department of Commerce

In the Matter of the PECFA Appeal of:

James Mews
Mews Companies, Inc.
5400 North 124'h Street
Milwaukee, Wisconsin 53225

PECFA Claim: #53225-2922-02 and 53225-2922-00
Hearing #98-155

Final Decision

Preliminary Recitals

Pursuant to a Petitions for Hearing filed on or about October 7, 1998 and October 22, 1998, under § 101.02 (6) (e) Wis. Stats., and § Comm/lLHR 47.53 Wis. Adm. Code, to review decisions of the Wisconsin Department of Commerce (Department) dated September 22, 1998 and October 9, 1998, a hearing was commenced on June 14, 2000 at Madison, Wisconsin. A Proposed Hearing Officer Decision was issued on March 22, 2001 and the parties were provided a period of twenty (20) days to file objections.

The Issue for determination is:

Whether the Department's Decisions dated October 9, 1998, and September 22, 1998, were incorrect with regard to the items identified in the Appeal Letters filed on October 7, 1998 and October 22, 1998.

There appeared in this matter the following persons:

PARTIES IN INTEREST:

James Mews
Mews Companies, Inc.
5400 North 124th Street
Milwaukee, Wisconsin 53225
By: Pamela H. Schaefer, Esq.
Cook & Franke, S. C.
660 East Mason Street
Milwaukee, Wisconsin 53202-3877

Wisconsin Department of Commerce
PECFA Bureau
201 W. Washington Avenue
P.O. Box 7838
Madison, Wisconsin 53707-7838

By: Kristiane Randal, Esq.
Assistant Legal Counsel
Wisconsin Department of Commerce
201 W. Washington Avenue, Room 322A
P.O. Box 7g38
Madison, Wisconsin 53707-7838

The authority to issue a Final Decision in this matter has been delegated to the undersigned by the Secretary of the Department pursuant to § 560.02 (3) Wis. Stats.

The matter now being ready for Final Decision I, Martha Kerner. Executive Assistant of the Department, hereby issue the following:

FINDINGS OF FACT

The Findings of Fact in the Proposed Hearing Officer Decision cited above are hereby adopted for purposes of this Final Decision.

CONCLUSIONS OF LAW ll

The Conclusions of Law in the Proposed Hearing Officer Decision cited above are hereby adopted for purposes of this Final Decision.

DISCUSSION

The Discussion in the Proposed Hearing Officer Decision cited above is hereby adopted for purposes of this Final Decision.

FINAL DECISION

The Proposed Hearing Officer Decision cited above is hereby adopted as the Final Decision of the Department.

PECFA Claims 53225-2922-02 and 53225-2922-00

NOTICE TO PARTIES

Request for Rehearing

This is a final agency decision under § 227.48 Wis. Stats. If you believe this decision is based on a mistake in the facts or law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision and which you could not have discovered sooner through due diligence. To ask for a new hearing, send a written request to Offfice of Legal Counsel, Wisconsin Department of Commerce, 201 West Washington Avenue, P.O. Box 7970, Madison, Wisconsin 53707-7970.

Send a copy of your request for a new hearing to all the other parties named in this Final Decision as "PARTIES IN INTEREST".

Your request must explain what mistake you believe the hearing examiner made and why it is important of you must describe your new evidence and tell why you did not have it available at the hearing in this matter. If you do not explain how your request for a new hearing is based on either a mistake of fact or law or the discovery of new evidence which could not have been discovered through due diligence on your part, your request for a new hearing will be denied.

Your request for a new hearing must be received by the Department's Office of Legal Counsel no later than twenty (20) days after the mailing date of this Final Decision as indicated below. Late requests cannot be reviewed or granted. The process for asking for a new hearing is set out in § 227.49 Wis. Stats.

Petition For Judicial Review

Petitions for judicial review must be filed not more than thirty (30) days after the mailing of this Final Decision as indicated below (or thirty (30) days after the denial of a denial of a request for a rehearing, if you ask for one). The petition for judicial review must be served on the Secretary, Office of the Secretary, Wisconsin Department of Commerce, 201 West Washington Avenue, P.O. Box 7970, Madison, Wisconsin 53707-7970.

The petition for judicial review must also be served on the other "PARTIES IN INTEREST" or each party's attorney of record. The process for judicial review is described in § 227.53 Wis.

PECFA Claims #53225-2922-02 and 53225-2922-00

Dated: 8/9/01

Martha Kerner
Executive Assistant
Wisconsin Department of Commerce
201 West Washington Avenue
P.O. Box 7970
Madison, Wisconsin 53707-7970

Copies to:

Above identified "PARTIES IN INTEREST", or their legal counsel if represented.

Office Manager
Unemployment Insurance Hearing Office
1801 Aberg Avenue, Suite A
Madison. Wisconsin 53707-7975
Date Mailed: 8/13/01

Mailed By: Linda K. Esser

STATE OF WISCONSIN
DEPARTMENT OF COMMERCE

IN THE MATTER OF: The claim for reimbursement under the PECFA program by

James Mews
Mews Companies Inc.
5400 North 124th Street
Milwaukee, WI 53225

MADISON HEARING OFFICE
1801 Aberg Ave., Suite A
P.O. Box 7975
Madison, WI 53707-7975

Hearing Number: 98-155

Re: **PECFA Claim #** 53225-2922-02 and 53225-2922-00

PROPOSED HEARING OFFICER DECISION

NOTICE OF RIGHTS

Attached are the Proposed Findings of Fact, Conclusions of Law, and Order in the above-stated matter. Any party aggrieved by the proposed decision must file written objections to the findings of fact, conclusions of law and order within twenty (20) days from the date this Proposed Decision is mailed. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your objections and argument to: Madison Hearing Office, P.O. Box 7975, Madison, WI 53707-7975. After the objection period, the hearing record will be provided to the Executive Assistant of the Department of Commerce, who is the individual designated to make the FINAL decision of the department in this matter.

STATE HEARING OFFICER: DATED AND MAILED:

Gretchen Mrozinski March 22, 2001

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MAILED TO:

Appellant Agent or Attorney
Attorney Pamela Schaefer
Cook and Franke SC
660 E Mason Street
Milwaukee, WI 53202-3877

Department of Commerce
Kelly Cochrane
Assistant Legal Counsel
P.O. Box 7838
Madison, WI 53707-7838

STATE OF WISCONSIN
DEPARTMENT OF COMMERCE

In the matter of the claim for reimbursement under the provisions of the PECFA program by:

James Mews (d.b.a. Mews Companies Inc.)
5400 North 124th Street
Milwaukee, W1 53225

PECFA Claim Nos. 53225-2922-02 and 53225-2922-00

PROPOSED DECISION

A decision of the Department of Commerce ("Department") concerning the Petroleum Environmental Cleanup Fund Act ("PECFA") was issued on September 22, 1998. A second decision was issued on October 9, 1998. Both decisions denied reimbursement of all or part of the claims submitted by James Mews ("claimant"). The claimant timely appealed. The appeals/decisions were consolidated into one hearing because of the similarity of issues. A hearing was held on June 14 and 15 of 2000 and on July 12 and 13 of 2000 before Administrative Law Judge Gretchen Mrozinski. Following the hearing, written briefs were received from the claimant and the Department. After careful review of the briefs and the record, this tribunal finds this matter ready for decision.

FINDINGS OF FACT

The claimant is the president of Mews Companies Inc, a concrete business. The company has essentially been inactive since 1996. The company is located in Milwaukee, Wisconsin and abuts the Menomonie River (the "site"). Groundwater generally flows in a southerly direction, towards the river. Years prior to the discovery of contamination and/or the removal of the diesel and oil tanks, the claimant received approval from the Army Corp of Engineers to add fill to its land. The fill contained broken asphalt from municipal streets and highways as well as other components such as sand and or brick. Twenty to thirty thousand cubic yards of fill were incorporated into the employer's property. After the fill was in place and sometime around 1983-84, the claimant began site construction. Buildings were erected and the waste oil and diesel tanks were installed. Thereafter approximately 20 to 25 trucks operated from this area. Those trucks were sometimes fueled at this location and at other times they were fueled at project sites.

The concrete business is seasonal and generally operates from April through November. During April through November, the claimant averaged at least 10,000 gallons of petroleum product throughout per month. However, from December through March, the throughput was minimal. As a result, the claimant's yearly throughput average was less than 10,000 gallons per month.

In 1993, three tanks were removed from the site--a waste oil tank and two diesel tanks. The tanks had leaked and the leakage had contaminated the surrounding soil and/or groundwater. The waste oil tank was separated from the two diesel tanks by a distance of approximately 40 feet and also by an intersecting road. Drake Environmental was hired by the claimant to perform a Phase II environmental assessment. Drake performed their assessment by setting up different project numbers for the waste oil tank area and the diesel tanks area in order to track separates costs. Drake believed that one area might not be as contaminated and therefore as costly to clean up as the other area. In June 1993, remediation of the tanks and surrounding areas occurred. The landfill disposal method was used.

Remediation continued until "clean soil" was found pursuant to the Department of Natural Resource's ("DNR") definition of "clean soil." However, the DNR's definition of clean soil does not mean "pristine." Rather, a low level of contaminant can still result in “clean soil” pursuant to DNR standards. Costs for the diesel and waste oil areas were tracked and claimed separately in the first PECFA claim.

Thereafter, monitoring of the groundwater revealed levels of benzo(a)pyrene and napthalene which continued to exceed DNR groundwater quality enforcement standards. Accordingly, the DNR denied Drake's 1994 closure request and required additional work to determine the extent of the groundwater contamination and the contaminate source. At this point, both the claimant and the DNR were tracking the site as two separate occurrences.

The claimant then retained Swanson Environmental (later changed to Braun Intertec) to conduct further field investigation required by the DNR. The DNR advised the claimant to pursue remediation of remaining groundwater contamination on the site. In response, Swanson installed two groundwater recovery wells, which operated for approximately one year, and which were discontinued in June 1997. The DNR denied closure requests in 1997 and 1998 and finally granted closure of the site in 1999.

Initially, the claimant, the DNR and the Department of Commerce all viewed the site as having two separate occurrences. However, in April 1996, the Department issued a decision which stated, "According to the information received at this offce the contamination plumes have intermingled, therefore the claims were combined as one and a single $7,500.00 deductible was assessed."

Key Environmental installed a monitoring well between the waste oil and diesel UST excavation area in 1998 ("EM-1/EB-1 well"). Water and soil samples were taken. Samples from this well resulted in detection of naphthalene, benzo(a)pyrene, petroleum odor, cadmium, and diesel range organics. Naphthalene is a petroleum component typical of both waste oil and diesel. The well was dug and samples were taken up to 19 feet below ground level. The fill ended at approximately 13.5 feet. Cadmium, naphthalene and diesel range organics were detected in the native soil, below the fill, at approximately 13.5 to 15.5 feet. In addition, all wells located throughout the site detected volatile organic compounds ("VOCs"). VOCs are not naturally occurring in soil. Cadmium can occur naturally in soil, but only at very low levels. The levels of cadmium at the site were higher than what would be attributed to a natural occurrence.

A study entitled, "Leaching of Pollutants from Reclaimed Asphalt Pavement" by Allan S. Brantley and Timothy G. Townsend, was published in the Environmental Engineering Science journal in 1999 (Volume 16, Number 2). This study subjected various fill/asphalt samples to leaching solutions to determine if they leached and if so, what components and how much. The results of this study were that VOCs and cadmium do not leach from fill/asphalt in any measurable quantity greater than their detection limits. Accordingly, the study concluded that fi11/asphalt docs not leach VOCs or cadmium.

The claimant contends that the concentrations of naphthalene and other associated petroleum parameters detected in the soil and groundwater at the EM-1/EB-1 well are representative of the general site conditions and not of the presence of "one contiguous contaminated area." The claimant contends that two occurrences exist. The Department contends otherwise.

APPLICABLE STATUTES AND ADMINISTRATIVE RULES

Wis. Stat. § 101.143(1)(cs) "Occurrence" means a contiguous contaminated area resulting from one or more petroleum products discharges.

Wis. Stat. § 101.143(2m) INTERDEPARTMENTAL COORDINATION. Whenever the department of Commerce receives a notification under sub. (3)(a)3. or the department of natural resources receives a notification of a petroleum product discharge under s. 292.11, the department receiving the notification shall contact the other department and shall schedule a meeting of the owner or operator or person owning a home oil tank system and representatives of both departments.

Wis. Admin. Code Ch. ILHR § 47.01(3) Intent of PECFA. (a) The PECFA fund does not relieve a responsible party from liability. The individual or organization responsible for a contaminated property shall carry out the remediation of that property as specified by the department of natural resources. PECFA's role is to provide monetary awards to responsible parties who have completed and paid for remediation activities and services. The availability or unavailability of PECFA funding shall not be the determining factor as to whether a remediation shall be completed.

(5) Most cost-effective remediation alternative. The PECFA fund shall ensure that awards are made for only the most cost-effective remediation alternative. The department may allow a higher cost alternative provided the responsible party assures: (a) Personal payment of the difference in cost between the lowest cost remediation and the higher cost alternative desired; or (b) That the objectives of the PECFA program would be furthered by the use of a specific remedial technology.

Wis. Admin. Code Ch. ILHR § 47.10(2) Provisions of eligibility letter. (a) When an owner, operator or person owning a home oil tank system has registered the tank systems on the property associated with the discharge and notified the department as specified under s. ILHR 47.10, the department shall upon request of the responsible party provide a letter of eligibility determination. This letter may include information on the PECFA program and the department's initial determination of the eligibility for an award under this chapter.

(b) The initial eligibility determination is made by the department based upon the information made available prior to the determination.

(c) This letter of eligibility may be used in securing loans to cover estimated costs for a proposed remediation.

(d) The initial estimate of eligibility shall not be binding if subsequently the owner, operator, person owning a home heating oil tank system or other source provides the department with additional information which necessitates a subsequent ineligibility determination to be made by the department.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

The major issue is whether there exist one or two occurrences at the site The claimant contends that there are two occurrences because the plumes associated with the diesel area and waste oil areas did not commingle. The Department contends that the plumes did commingle and as such, there is only one occurrence. If the claimant's contention is sustained, the claimant is entitled to additional PECFA money to cover his costs. If the Department's contention is sustained, the claimant is limited to a cap of $500,000.00 (The more occurrences, the more PECFA money allowed to the claimant). For the following reasons, the Department's contention is sustained.

The claimant has the burden of proving that more than one occurrence existed on the site. The claimant did not meet this burden. First, it is clear that contaminants existed between the sites as late as 1998 per the soil boring and groundwater samples of EM-1/EB-1. Those contaminants are common substances found in diesel or waste oil and were the same contaminants found in the diesel and waste oil excavation areas. Accordingly, the presumption is that the plumes from the diesel and waste oil tanks commingled, establishing only one occurrence. The claimant has the burden of rebutting such presumption by proving, that such contaminants did not come from the diesel or waste oil tanks, but instead, were naturally occurring in the soil, are attributable to the fill material, or are attributable to some other non-PECFA eligible source.

The claimant argues that the Department requires that a pristine soil sample be found between the excavation sites before two occurrences will be found. The claimant further argues that if the Department enforced such a requirement, it would amount to improper rule making by the department. Moreover, it would be an impossible condition given that fill material by its definition contains petroleum components which can never amount to pristine or a completely clean soil sample. In addition, contaminants could come from sources other than the PECFA eligible sources. Thus, even if the two plumes never collided, once occurrence may still be found given the presence of non-eligible PECFA contaminants. The claimant's arguments are not without merit but are nevertheless discounted for the following reasons.

An "occurrence" means a "contiguous contaminated area resulting from one or more petroleum products discharges." Wis. Stat. § 101.143(1)(cs). This statutory section is not ambiguous. If the two plumes commingled, regardless of whether the commingling was below DNR cleanup levels, the contamination becomes one occurrence. The Department admits that when background contamination exists at a site, an occurrence would be defined by the extent of the PECFA eligible contaminants that were released from the PECFA eligible tank systems. The ineligible background contaminants--*not attributable to the PECFA eligible tank systems*-- would not be used by the Department to find one occurrence. (See Department's Post-Hearing Brief page 18). Accordingly, this tribunal does not find any improper rule making by the Department as the statutory section is clear and the Department's interpretation of such section is reasonable. Furthermore, the fact that the commingling is below DNR clean up levels does not eliminate the fact that commingling can still occur resulting in one occurrence per the PECFA program.

The question thus remains, Did the plumes commingle or is the residual contamination attributable to some other source? The persuasive evidence establishes that the claimant cannot prove to a reasonable certainty that the petroleum contamination at the EM-1/EB-1 well is attributable to the fill or to the natural attributes of the soil. As such, the claimant has failed to rebut the above presumption. While fill/asphalt does contain petroleum components, the claimant has failed to prove that such components leached into the surrounding groundwater or soil. The claimant also failed to prove that the contamination was naturally occurring at the EM-1/EB-1 well area. The levels of cadmium alone at this well were higher than any level of naturally occurring cadmium. The claimant did not successfully establish that the cadmium levels were attributable to a source other than the diesel and/or waste oil tank excavation areas.

This tribunal found persuasive the testimony of Nancy Kochis. Ms. Kochis testified that wells located in or about the excavation areas contained the same or similar VOCs as did the EM-1/EB-1 well. In fact, all wells showed evidence of contaminants. In addition, the natural soil located in EM-1/EB-1 well also contained similar VOCs. Ms. Kochis credibly testified that based upon her expertise, the testing results provided by the claimant, and scientific journals/reports, the contamination located at EM-1/EB-1 is attributable to the waste oil and diesel tanks/excavations. Ms. Kochis further pointed out that the claimant did not perform any scientific study and/or analysis to buttress its contention that the contamination at EM-1 /EB-1 was due to sources other than the waste oil or diesel tank areas. For instance, the claimant did not scientifically determine whether off-site contamination played a role in the test results. In addition, the claimant did not scientifically determine that the fill at issue leached. Instead, the claimant contended that fill/asphalt can leach. The latter is not the same as proving that the fill at issue did leach. Finally, Ms. Kochis also credibly testified that the claimant could have defined a PECFA eligible occurrence at the site by looking at the parameters specific to the eligible release and comparing them against the known background contamination. However, the claimant did not look at the soil and groundwater data and compare it against the background contaminants to define PECFA eligibility.

For the above reasons, this tribunal finds that the site at issue contains one PECFA eligible occurrence.

Several other issues were presented which are easily resolved. First, the claimant contended that a copy of a check was enough to prove that a payment was made to a creditor and therefore, should be reimbursable by PECFA. Since the check at issue was already over the $500,000.00 cap, this check is non-reimbursable regardless of whether the copy of the check was sufficient proof that a creditor had been paid. Second, the claimant did not meet the "throughput" requirement per Wis. Stat. § 101.143(4)(d)2. The statutory language clearly requires an "annual" throughput average of 10,000 gallons of petroleum per month. Annual

means 12 months. The claimant did not meet the throughput requirement which would have extended the cap to $1,000,000.00. Third, the claimant did not prove that he was harmed in any way by the Department of Commerce's and the DNR's failure to hold a meeting pursuant to Wis. Stat. § 101.143(2m). As a matter of practice, the Department does not hold such meetings. Moreover, the claimant's environmental consultants knew that such meetings were not held based upon their past experience with PECFA claims. n addition, the claimant did not establish how the holding of such a meeting would have changed the outcome of this case.

Finally, the claimant did not prove that he detrimentally relied upon the Department's initial treatment of the site as having two occurrences. The Department never represented to the claimant that it had conclusively determined that two occurrences existed. In fact, as early as 1996, the Department clearly advised the claimant that it believed that only one occurrence existed. Moreover, the administrative rules advise that the Department's initial eligibility determination shall not be binding if subsequent information surfaces which leads to a different conclusion. See Wis Admin. Code Ch. ILHR 47.10(2). In addition, the PECFA fund does not relieve a responsible party from liability. The claimant had a legal duty to clean tip the site. The persuasive evidence establishes that the claimant's pattern and practice throughout the relevant time-periods was to comply with the law, specifically the DNR's requirements for cleanup. It is not persuasive that he would have taken a different course of action had he known earlier that the Department would eventually find one occurrence. As such, the claimant's actions were not a result of the Department's initial belief that the site may have contained two occurrences. The claimant's actions were a result of his desire to clean up the site in accordance with DNR rules and regulations. The claimant's actions were admirable and responsible, but do not amount to detrimental reliance on the Department's initial treatment of this matter.

This tribunal therefore finds that the claimant's claim for reimbursement of costs exceeding the $500,000.00 PECFA maximum award cap are not entitled to reimbursement pursuant to Wis. Stat. Ch. 101.

DECISION

The Department of Commerce's decisions of September 22 and October 9, 1998 are affirmed.

BY Gretchen Mrozinski
Administrative Law Judge